

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

XINGZHU LIU, LAN CHEN and VINCENT LIU¹

Petitioners

Xingzhu Liu and Lan Chen

For the Petition

Kevin Martel, Program Manager II

Department of Housing and

Community Affairs

Mark Miller

Joy Miller

Opposed to the Petition

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Board of Appeals Case No. S-2768
(OZAH Case No. 10-19)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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¹ The petition (Exhibit 1) lists Vincent Liu, Xingzhu Liu's son, as a Petitioner, as well as Xingzhu Liu and Yan Chen. Vincent is also on the deed to the premises. Exhibit 18.

I. STATEMENT OF THE CASE

Petition No. S-2768, filed on January 28, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the eastern wing of Petitioners' home at 8925 Bradmoor Drive, Bethesda, MD, on land in the R-60 Zone. The property's legal description is Lot 9, Block 6 of Ayrlawn Subdivision.

On February 4, 2010, the Board of Appeals issued a notice that a hearing in this matter would be held on May 20, 2010, before the Office of Zoning and Administrative Hearings (Exhibit 11). Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued May 12, 2010, recommended approval of the special exception, with conditions. Exhibit 13.²

Kevin Martel, Program Manager for the Department of Housing and Community Affairs (DHCA), inspected the property on the morning of the hearing, and reported in a memorandum dated May 20, 2010 that no items needed correction. Exhibit 17. In his memorandum, Mr. Martel indicated that, based upon square footage and accessory apartment requirements, two unrelated persons or a family of up to five people may reside in the unit. He also mentioned that a special exception for this accessory apartment was approved by the Board of Appeals in 1991 (Exhibit 15), and it was revoked by the Board on May 9, 2008, at the request of the former owner. The Board resolution recites that the former owner requested revocation because the apartment had not been used for years. Exhibit 16.

A public hearing was convened as scheduled on May 20, 2010, and Petitioners Xingzhu Liu and Lan Chen appeared *pro se*. Petitioners produced a copy of their deed to the premises (Exhibit 18) and testified in support of their petition. They also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibit 13) and the housing inspector's report (Exhibit 17). Tr. 12-13.

² The Technical Staff report is frequently quoted and paraphrased herein.

Testimony was received, as well, from Kevin Martel of the Department of Housing and Community Affairs. Two community members appeared in opposition, Mark and Joy Miller. The Millers also wrote an opposition letter (Exhibit 12), as did another neighbor, Robert and Janet Katz. Exhibit 14.

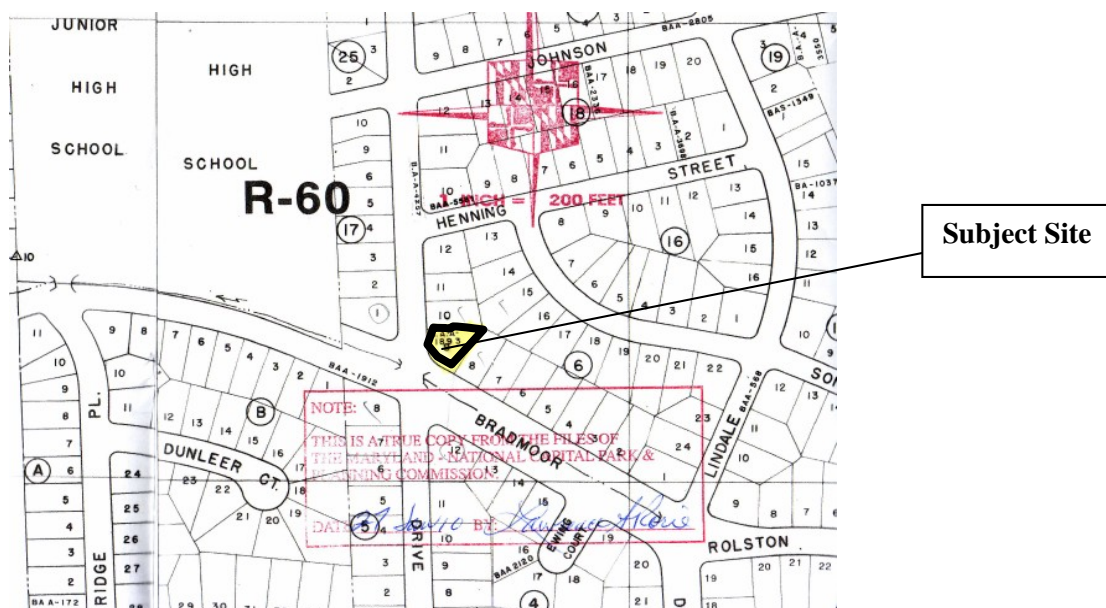
In a memorandum dated May 21, 2010, DHCA reported no other active accessory apartments in the neighborhood and only one registered living unit.³ Exhibit 21. Mr. Martel also supplemented his memorandum of May 20, 2010, by an e-mail dated May 24, 2010 (Exhibit 22), which indicated that the accessory apartment has habitable space of 422 square feet.

The record closed as scheduled on June 1, 2010. Since Petitioners satisfy all the requirements for the special exception, the Hearing Examiner recommends that it be granted, subject to the conditions set forth in Part V of this report.

II. FACTUAL BACKGROUND

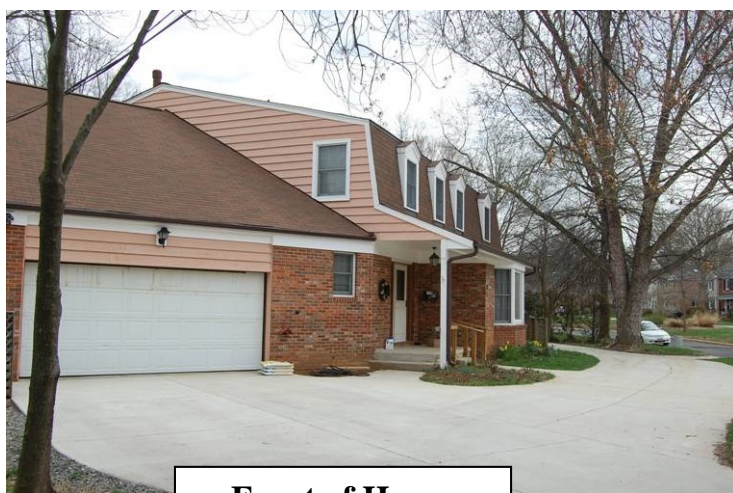
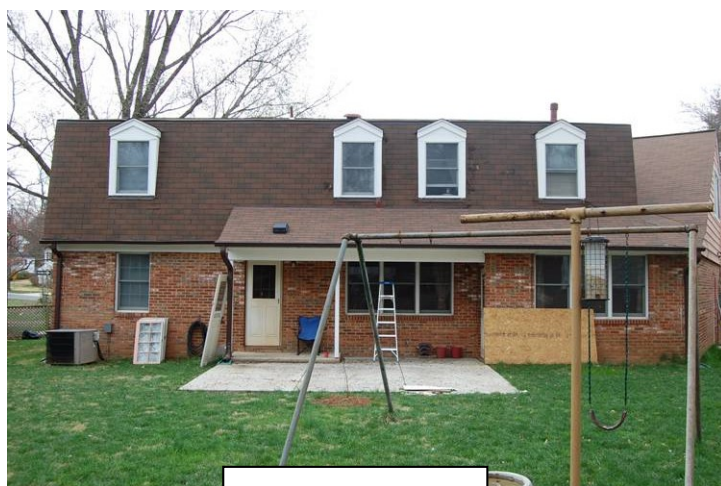
A. The Subject Property and the Neighborhood

The subject property is a corner lot, 8,189 square feet in size and triangular in shape. It is located at the intersection of Ewing Drive and Bradmoor Drive, in the R-60 Zone, as can be seen on the following Zoning Map (Exhibit 10):

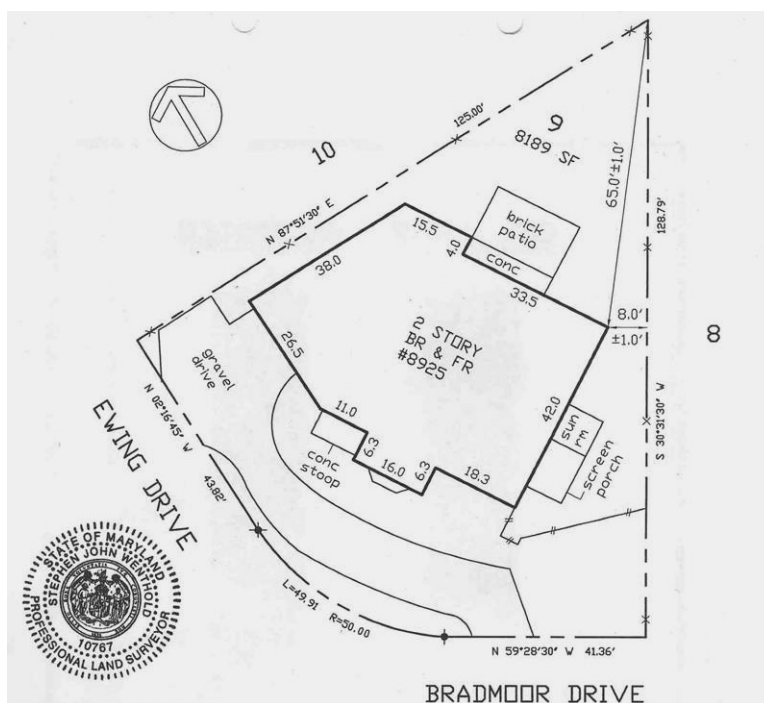


³ Another accessory apartment in the area had been revoked and two registered living units had been withdrawn.

According to Technical Staff, the existing house was constructed in 1949. It is two-stories and contains 4,065 square feet of floor space. The house is located on a relatively flat parcel, and the backyard is fenced. Staff reports that the existing landscaping is well-maintained, but notes that there is an old swing set in the backyard. Since the site is on a corner lot, the site's driveway has access to both Ewing Drive and Bradmoor Drive. The home has a two-car garage and "ample space for extra parking on the driveway and along the street." Exhibit 13, p. 3. The following photographs of the subject property were provided by Technical Staff:

**Front of House****Back of House**

The Site Plan for the subject site (Exhibit 4) is shown below:



The site has been exempted from forest conservation requirements by Technical Staff (Exhibit 7). Staff indicates that there are no environmental issues or concerns. Exhibit 13, p. 8.

For the purposes of this application, Technical Staff defined the neighborhood by the following boundaries, which are accepted by the Hearing Examiner: Henning Street and Sonoma Road to the north; Lindale Drive to the east; Bradmoor Drive to the south (inclusive of the confronting homes); and the North Bethesda Middle School to the west. The neighborhood is depicted below in an aerial photo provided by Technical Staff (Exhibit 13, p. 5):



Staff reports that all uses in the neighborhood are single-family, detached homes, except for the school. The entire neighborhood is zoned R-60. The neighborhood boundary, which is depicted in the map below, has been drawn to include any nearby properties that may be affected by a potential increase in density or traffic. The middle school is included, as it is foreseeable that residents of the

proposed apartment may attend classes there. No other special exceptions currently exist within the neighborhood boundaries.

B. The Proposed Use

The Petitioners are requesting approval of an existing 422 square foot accessory apartment located in the eastern wing of their home.⁴ Petitioners Xingzhu Liu and Lan Chen do not live in the home, but their son, Vincent Liu, does, along with his fiancée and others. Tr. 16-19 and Exhibit 17. Petitioners were informed by the Hearing Examiner that, if the accessory apartment is approved, they cannot have non-family members living on the premises in addition to the accessory apartment tenants. Tr. 19-20.

No internal or external modifications are required to accommodate the special exception. Exhibit 17. The accessory apartment entrance is located on the east side of the home and does not detract from the appearance of the neighborhood. As the photograph below from the Staff report illustrates, a paved walkway leads from the property's driveway to the apartment entrance.

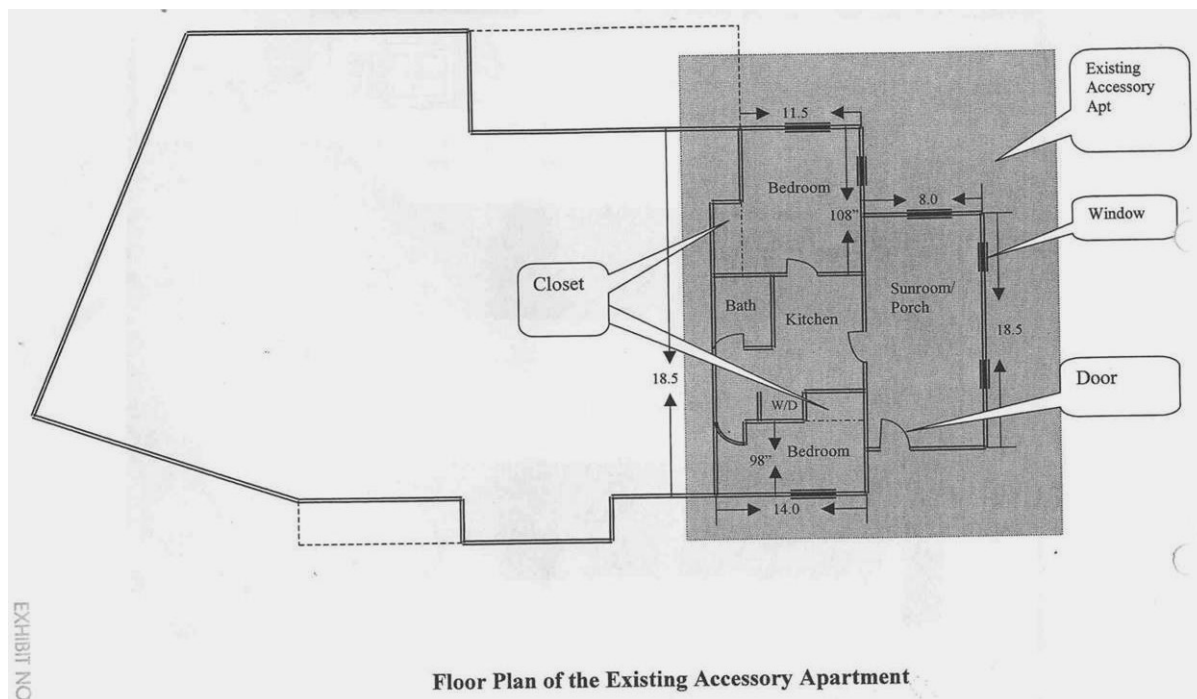


**Accessory
Apt. Entrance**

⁴ Petitioners' statement in support of their petition (Exhibit 3) indicates that the apartment is 407 square feet, but the Housing Inspector's measurements reveal 422 square feet of habitable space. Exhibit 22.

Technical Staff reports that adequate lighting is located above the entrance to the accessory apartment, and it is anticipated that the driveway parking pad located in front of the apartment will be utilized for the apartment residents.

The apartment's floor plan (Exhibit 6) is shown below:



The apartment contains a kitchen/dining area, two bedrooms, a bathroom and a living area denoted “sunroom/porch.” Though that room is denominated a “screen porch” on the site and landscape plans, it has actually been fully enclosed, as shown on the following photograph (Exhibit 12(d)):

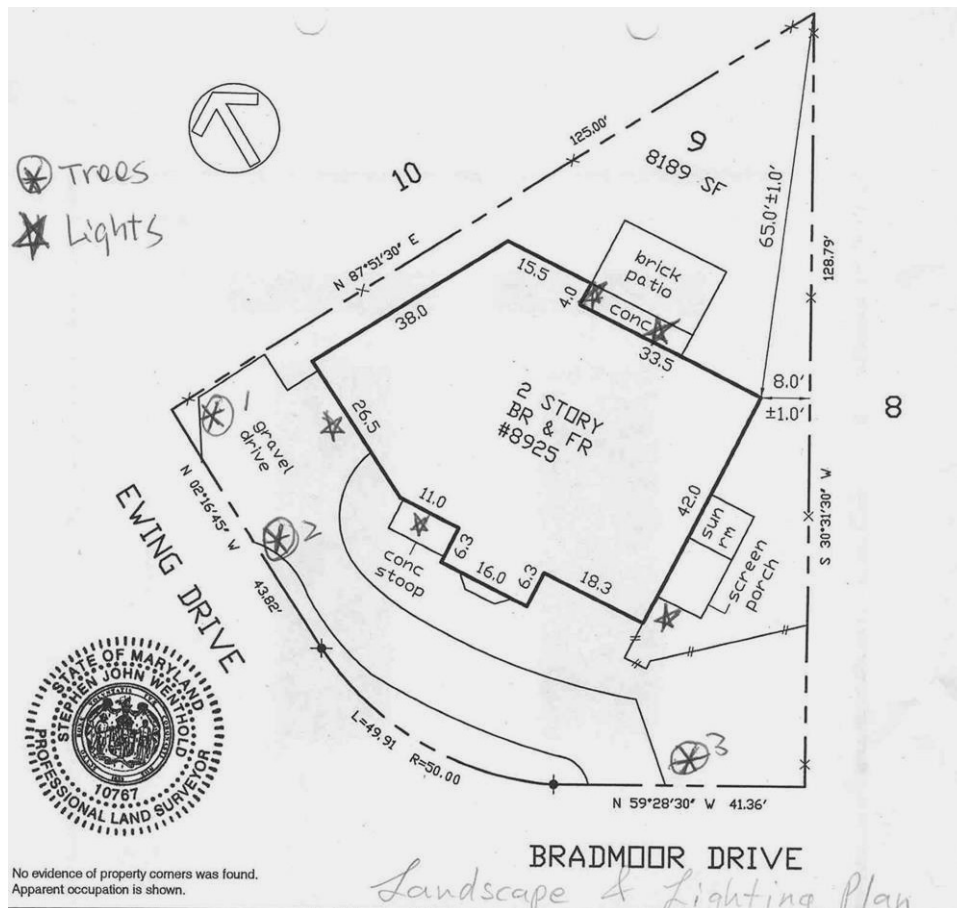


The May 20, 2010 memorandum from Kevin Martel, DHCA Program Manager (Exhibit 17), sets forth the following comments:

1. The petitioner does not live in the house. According to the petitioner the owner's son, son's fiancée, fiancée's mother, and a friend live in the main house. The owner's son is also on the deed, according to the petitioner.
2. A licensed and an approved accessory unit had been existence since 1991 when the special exception was revoked in 2008 by the previous owner. Numerous subsequent required inspections required by the mandates of the special exception revealed no issues. To date there have been no investigations concerning allegations of violations of the special exception.
3. The accessory apartment meets Housing Code requirements and needs no modification for continued use.
4. Based upon square footage and accessory apartment requirements, two unrelated persons or a family of up to five people may reside in the unit. [Emphasis added.]

The Hearing Examiner recommends a condition limiting occupancy as specified by DHCA.

The existing landscaping and lighting are shown below on the Landscape and Lighting Plan (Exhibit 5):



According to Technical Staff, the property's landscaping is relatively well-maintained and falls within the standards expected for a typical single-family home. Also "[t]he use will cause no objectionable illumination or glare" into the neighborhood. Exhibit 13, pp. 8 and 13.

Transportation Planning staff found that the proposed use "satisfies the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests and will have no adverse effects on area roadway conditions or nearby pedestrian facilities." Exhibit 13, Attachment 2. Staff estimates that one additional vehicle trip would be generated in both the AM and PM Peak-Hours.

LATR was satisfied without the need for a traffic study because the combined use would generate fewer than 30 peak-hour trips. Since the existing single-family dwelling on the property, combined with the proposed accessory apartment, will actually generate fewer than 3 peak-hour trips during the weekday morning and evening peak-periods, the Petitioners are also not required to take any action to satisfy the 2009-2011 Growth Policy test for Policy Area Mobility Review (PAMR).

As reported by Technical Staff (Exhibit 13, p. 7),

Vehicular access to the existing house and accessory apartment will be through an existing semi-circular driveway off Ewing and Bradmoor Drive. Off-street parking associated with the main dwelling and the accessory apartment will be in the garage and on the existing driveway to the dwelling, where at least five vehicles can be accommodated. Additionally, on-street parking is permitted along the streets in the vicinity of the property. The special exception will not have an adverse effect on vehicular and pedestrian access or pedestrian safety.

C. The Master Plan

Petitioner's property is subject to the *Bethesda-Chevy Chase Master Plan*, approved and adopted in April 1990. As pointed out by Technical Staff, the proposed use is consistent with the *Bethesda-Chevy Chase Master Plan*, which supports special exception uses "that contribute to the housing objectives in the Master Plan" (p. 31, ¶ numbered 4). In fact, the Plan specifically "endorses

expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ numbered 4).

An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the *Bethesda-Chevy Chase Master Plan*, as does the Hearing Examiner.

D. Neighborhood Opposition

As noted in the first section of this report, there is some opposition in the neighborhood to the proposed accessory apartment. This opposition consists of a letter from confronting neighbors, Robert and Janet Katz (Exhibit 14), and a letter (Exhibit 12) and testimony from abutting neighbors, Mark and Joy Miller. Tr. 36-51.

The thrust of the opposition appears to be that these neighbors do not want any accessory apartments in their neighborhood and fear that it “will affect the character of our neighborhood.” See Exhibit 12. The Millers also expressed concern about non-family members living on the premises, car repairs being done on the site, some debris left outside and vehicles parked in the narrow curb area between the two houses, which blocks visibility from their driveway. Tr. 45-46. The Millers produced a photograph showing the narrow space between the two homes, and it is shown below (Exhibit 20):



**Curb Between
the Two Homes**

Mr. Miller asked for a condition that would prohibit parking in that space, and Mr. Liu indicated that he had no objection. Tr. 46. The Hearing Examiner therefore recommends such a condition in Part V of this report. The Hearing Examiner also recommends conditions which restrict residency on the premises in accordance with the Zoning Ordinance, and which prohibit automobile repairs on the site.

Other than the issue of parking in the spot between the homes, as mentioned above, there is no parking issue on this site. Technical Staff indicates that parking on the property is more than adequate, and on-street parking is permitted, as well. Exhibit 13, p. 7. Mr. Martel of DHCA also confirmed that there is ample parking (Tr. 33):

They have a two car garage. They can park at least four cars in the driveway stacked. There's also an additional driveway on the side of the house for the accessory apartment. So there's more than adequate off-street parking for that property.

The more general complaint of the neighbors (*i.e.*, that they oppose the grant of any accessory apartment in their neighborhood fearing that such a use would have negative effects) cannot be a basis for denial because the Council has established its policy, through Zoning Ordinance §59-C-1.31(a), that accessory apartments are permitted as special exceptions in the R-60 Zone.

While it is clear that some of the neighbors do not want an accessory apartment in their neighborhood, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not on whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). The Hearing Examiner finds that the points raised by the neighbors do not form a basis for denying the special exception petition before the Hearing Examiner, but some of their concerns do warrant additional conditions, as recommended in Part V of this report.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner Xingzhu Liu, who appeared *pro se*. Kevin Martel of the Department of Housing and Community Affairs testified, as did abutting neighbors, Joy and Mark Miller, who oppose the petition.

A. Petitioners' Case

Petitioners Xingzhu Liu (Tr. 11-30):

Petitioner Xingzhu Liu executed an affidavit of posting (Exhibit 19) and submitted a copy of his deed to the premises (Exhibit 18). Mr. Liu agreed to meet all the conditions set forth in the Technical Staff Report (Exhibit 13) and the housing inspector's report (Exhibit 17). Tr. 12-13.

Mr. Liu testified that the house was remodeled in 1991 and made larger. When he bought this house, there was an accessory apartment, but the special exception had been revoked. Currently his son Vincent, who is an owner on the deed, lives there, with his fiancée. Her mother lived there for several months and then left; she will return in several months. His son had friends come visiting, who washed and repaired their car in front of the house, and made some noise. Also, the yard is not always as clean as it should be, but he will make it cleaner. If the neighbors have any concerns and call him, he will straighten it out.

[Petitioners were informed by the Hearing Examiner that, if the accessory apartment is approved, they cannot have non-family members living on the premises in addition to the accessory apartment tenants. Tr. 19-20.]

Mr. Liu identified the site plan, landscape and lighting plan, the floor plan and photos of the premises. On cross-examination, Mr. Liu testified that there are two boys currently renting the accessory apartment. A girl also lives there. He was also questioned about repairs which enclosed the sunroom.

B. Government WitnessesDHCA Program Manager II Kevin Martel (Tr. 21-22; 31- 40):

Kevin Martel, DHCA Program Manager II, testified that he inspected the premises and it currently meets housing code standards. The only issue from his perspective is that a friend lives in the house. He also measured the bedrooms. One bedroom measured approximately 135 square feet and the other measured about 165 square feet. He will supply a figure for the overall habitable space later, but it is not even close to the 1200 square foot maximum.

Mr. Martel stated (Tr. 32):

There's more than adequate off-street parking there. The house is in good shape. The property is in good shape. I see no issues concerning accessory apartment standards with that property.

More specifically, they have a two car garage. They can park at least four cars in the driveway stacked. There's also an additional driveway on the side of the house for the accessory apartment. With room for two cars in the garage and five in various driveway positions, there's more than adequate off-street parking for the property.

C. Community TestimonyJoy and Mark Miller (Tr. 36-51):

Joy Miller testified that Mr. Liu is not being truthful. She stated that currently, there are four people living in the primary part of the house and at least two in the accessory apartment. There are four cars that are there permanently, and there have been other cars there. There are at least four people residing in the big part of the house. She believes that this house has been acquired for investment purposes.

I think the primary issue with us is his, in his petition he says to make the community more housing affordable. Our entire neighborhood, except for his home, I am the one house that has the two tear downs still on either side of me. Every other home within the area has been renovated, multi-million dollar homes, and I feel that you can't base an accessory apartment for something that you don't even have an application for as a reason to purchase and make it affordable. Tr. 40.

Mrs. Miller feels that Petitioners do not meet the statutory standards for an accessory apartment because they have unrelated persons living in the main part of the home. When the Hearing Examiner explained that conditions would be imposed to prevent improper occupancy, Mrs. Miller responded, “I just am opposed to a boarding house. It's a rooming house and we're just opposed to that.” Tr. 41.

Mr. Miller testified that there is narrow space between his home and the subject site, and he produced a photograph (Exhibit 20) to show it. He indicated that some visitors to the subject site park in that space. Mr. Miller asked for a condition that would prohibit parking in that space, and Mr. Liu indicated that he had no objection. Tr. 44-46.

Mr. Miller also indicated that the person who Mr. Liu said was washing his car, was actually cleaning off his engine with toxic chemicals that were being rinsed out into the street. Tr. 47. Mr. Miller also identified photos he had taken of the subject site.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 13).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the

general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following are inherent characteristics of accessory apartments, as spelled out by Technical Staff (Exhibit 13, p. 10):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
- (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions;
- (3) a separate entrance and walkway and sufficient exterior lighting;
- (4) sufficient parking;
- (5) the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic, and parking activity; and
- (6) the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found no unusual site conditions, and stated (Exhibit 13, pp. 10-11):

In the instant case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment. . . .

The apartment entrance is typical of a side-entry to a single-family house, making it difficult to distinguish from any other neighborhood home. The walkway and grounds of the accessory apartment will be safe and illuminated while consistent with typical residential standards. . . .

Here, in addition to the five available spaces in the driveway and garage of the home, there is space for vehicles to park along the neighborhood streets. The neighborhood has a relatively low demand for on-street parking as the vast majority of homes in the neighborhood park in their driveways or garages. Accordingly, there is adequate parking on site to ensure sufficient neighborhood parking even with the existence of an additional household on the block.

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff. Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects warranting denial of this petition.

B. General Conditions

The general standards for a special exception are found in Zoning Ordinance §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(a).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: Petitioners' property is subject to the *1990 Bethesda-Chevy Chase Master Plan*. For the reasons set forth in Part II. C. of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff concluded that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. As stated by Staff (Exhibit 13, p. 12):

The proposed special exception will be in harmony with the general character of the neighborhood. It will have only a slight impact on population density; it will result in only a modest increase in the intensity of use of the property with no change in the character of the use; it will result in only a minimal increase in vehicular traffic; adequate parking is available both on and off-street; and no other accessory apartments exist within the neighborhood

The Hearing Examiner agrees and so finds. Moreover, as found by Staff, "The proposed special exception will be adequately served by existing public services and facilities." Exhibit 13, p. 14.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for the reasons stated in response to the previous provision, and so finds.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence that the special exception would cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Given the indoor and residential nature of the use, the accessory apartment would not produce these effects. Technical Staff has found that entrance into the accessory apartment is appropriately illuminated, and “will cause no objectionable illumination or glare.” Exhibit 13, p. 13.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that the addition of this special exception “will not increase the intensity or scope of special exception uses sufficiently to affect the area adversely.” Exhibit 13, p.13. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area. Therefore, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely; nor will it alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that “The proposed special exception will be adequately served by existing public services and facilities.” Exhibit 13, p. 14.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip

during each of the weekday peak-hour periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds. Exhibit 13, p. 14.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 13), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in*

common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the eastern portion of an existing dwelling, thus sharing at least one party wall in common with the main dwelling.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension will be constructed.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1949. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: This was an issue raised in this case about unrelated persons living on the premises in addition to the tenants. The Hearing Examiner informed Petitioners that that would not be permitted; nor could they receive rentals in addition to the accessory apartment. Conditions have been recommended specifying that Petitioners may not have a guest

room for rent, a boardinghouse or a registered living unit, in addition to the accessory apartment; that they must not receive compensation for the occupancy of more than one dwelling unit on the property; and that they must not have unrelated persons living on the premises in addition to the tenants.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: A separate entrance to the accessory apartment is located on the east side of the house. Access to this entrance is via a driveway, which partly extends to the side yard of the house. Technical Staff reports that the appearance of a single-family dwelling unit has been preserved, as the entrance to the accessory apartment is incorporated into the existing structure.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No external modifications or improvements are proposed.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment will be subordinate to the main dwelling, as it will occupy approximately 422 square feet of space, in a dwelling which has about 4,065 square feet. It also is well within the 1,200 square foot cap.

(b) Ownership Requirements

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period

of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The home is occupied by Vincent Liu, who is an owner of the property, along with his parents. Exhibit 18.

(2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: Petitioners acquired the property in October of 2008. Thus, more than one year has elapsed.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: A condition to this effect is recommended in Part V of this report, as discussed in answer to subsection (a)(5) above. It appears from the record that Petitioners are receiving compensation for only one dwelling unit at this time.

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: The Petitioners are the owners of the property.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards

of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is 8,189 square feet in area, well over the 6,000 square foot minimum.

The following chart from the Technical Staff Report (Exhibit 13, p. 9) demonstrates compliance with all development standards for the R-60 Zone:

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	2 stories	§ 59-C-1.327
Minimum Lot Area	6,000 sq. ft.	8,189 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	Approx. 115 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	Approx. 115 ft.	§ 59-C-1.322(b)
Minimum Setback from Street for Corner Lot	15 ft.	27 ft.	§ 59-C-1.323(a)
Minimum Side Yard Setback	8 ft. one side; sum of 18 ft. both sides	9 ft south side; 6 ft. north side; 15 ft. sum of both ⁵	§ 59-C-1.323(b)(1)
Minimum Rear Yard Setback	20 ft.	65 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	35 percent	25 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	407 sq. ft.	§ 59-G-2.00(a)(9)

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

⁵ The house is a conforming building despite not meeting the minimum side yard setbacks because the home was built on a lot legally recorded by subdivision plat before June 1, 1958. §59-B-5.3.

Conclusion: According to the Technical Staff report (Exhibit 13, p. 18) and a memorandum from DHCA (Exhibit 21), there are no other approved accessory apartments currently in the defined neighborhood. The proposed accessory apartment, if granted, therefore will not result in an excessive concentration of similar uses in the general neighborhood.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: As previously discussed there are at least five, and possibly up to seven off-street parking spaces available on the site. Thus, there is more than adequate space for parking.

(d) Data to accompany application. The Board may waive for good cause shown any of the data required to accompany an application for special exception upon written request of the applicant. The Board may accept plans or drawings prepared by the applicant so long as they are substantially to scale and provide information the Board determines is adequate.

Conclusion: Not applicable.

(e) Any accessory apartment approved by the Board between December 2, 1983, and October 30, 1989, in accordance with the standards in effect during that period, is a conforming use and it may be continued as long as the accessory apartment complies with the conditions imposed by the Board and all provisions of Division 59-G-1.

Conclusion: Not applicable.

(f) Notice by sign required for continuation of use by new property owner. If a new property owner applies to continue an existing accessory apartment as a minor modification, a sign giving notice of the application must be erected and maintained as required by Sec. 59-G-1.3(c).

Conclusion: Not applicable.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this report, the Housing Code Inspector's memorandum (Exhibit 17) notes that no repairs are needed, but that occupation of the accessory apartment must be limited to no more than two unrelated persons or a family of up to five. As mentioned above, Petitioners have agreed to meet all conditions. Those conditions are reflected in the following recommendations.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2768 for a special exception to permit an accessory apartment located at 8925 Bradmoor Drive, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of their testimony, representations and exhibits of record identified in this report;
2. Petitioners must comply with DHCA's determination of the maximum permitted occupancy for the accessory apartment (*i.e.*, the accessory apartment may be occupied by no more than two (2) unrelated persons or a family not to exceed five (5) persons), and any other DHCA directives needed to ensure that the accessory apartment is maintained up to Code;
3. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. Petitioners must not have a guest room for rent, a boardinghouse or a registered living unit, in addition to the accessory apartment, and they must not receive compensation for the occupancy of more than one dwelling unit;
5. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons;

6. Petitioners must make parking spaces available for their accessory apartment tenants, either off-street or on the street directly in front of Petitioner's home. Tenants and their guests must not park on the street in the curb space between the subject site and the abutting neighbor at 9003 Ewing Drive, Bethesda, Maryland;

7. Petitioners shall ensure that the tenants do not perform automobile maintenance on the subject site;

8. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 1, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner